

**STATE OF MARYLAND
JUDICIARY**

Policy on the Family and Medical Leave Act

I. PURPOSE

To establish guidelines in the administration of employee rights and protections under the Family and Medical Leave Act, a federal employment law. The guidelines found in this policy reflect the spirit and requirements of the Act.

II. DEFINITIONS

A. Administrative Official

1. The Clerk of Court for the Court in which the employee works;
2. The Administrative Clerk or Administrative Commissioner of the District in which the employee works; or
3. The director of the respective department or office within the Courts of Appeal, the Administrative Office of the Courts, the District Court Headquarters, or the Court-Related Agency in which the employee works.

B. Child – A biological, adopted, foster or stepchild, or a child of a person standing in *loco parentis*, or a legal ward, who is either under the age of 18 or 18 or older and incapable of self-care because of a mental or physical disability.

1. Mental or physical disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual.
2. Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living.
 - a. Activities of daily living include caring for one's grooming and hygiene, bathing, dressing and eating.
 - b. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using the telephones and directories, using a post office, etc.

- C. Family and Medical Leave Act (FMLA)** – A federal law that provides a period of protected unpaid absence for an employee due to reasons stated in Section V of this policy.
- D. Health Care Provider:**
1. A doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the State in which the doctor practices;
 2. Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;
 3. Nurse practitioners, nurse-midwives and clinical social workers who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;
 4. Christian Science practitioners listed with the First Church of Christ Scientist in Boston, Massachusetts;
 5. Any health care provider from whom an employer or a group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and
 6. A health care provider as defined above who practices in a country other than the United States, who is licensed to practice in accordance with the laws and regulations of that country.
- E. In Loco Parentis** – To serve in the place of a parent. This generally refers to someone who has day-to-day responsibilities to care for and financially support a child, or in the case of an employee, who had such responsibility when the employee was a child.
- F. Needed to Care for a Family Member** – Includes, (1) physical and psychological care and (2) where the employee is needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.
- The above includes situations when the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance, which would be beneficial to a child, spouse, or parent with a serious health condition who is receiving inpatient or home care.
- G. Parent** – A biological parent or an individual who stands *in loco parentis* to an employee. This does not include a parent-in-law.

H. Serious Health Condition

The FMLA defines a serious health condition as an illness, injury, impairment, or physical or mental condition that involves:

1. Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility including any period of incapacity, or any subsequent treatment in connection with such inpatient care; or
2. Continuing treatment by a health care provider for a serious health condition which involves any one or more of the following:
 - a. A period of incapacity (i.e. an inability to work) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves:
 - (1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g. physical therapist) under orders of, or on referral by, a health care provider; or
 - (2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the health care provider's supervision. (Please note that a regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed rest, drinking fluids, exercises, and other similar activities that can be initiated without visits to a health care provider is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.);
 - b. Any period of absence or incapacity due to pregnancy, or for prenatal care;
 - c. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition which:

- (1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under the direct supervision of a health care provider; and
 - (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
 - (3) May cause episodic rather than a continuing period of incapacity (e.g. asthma, diabetes, epilepsy, migraines, etc.);
 - d. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. (The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.);
 - e. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis);
 - f. Treatment, including but not limited to examinations, to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.
- I. **Spouse** – An employee who seeks to use FMLA in connection with a serious health condition of the employee's spouse must be married within the meaning of that term in the jurisdiction in which the employee resides. **If the employee is a resident of Maryland, common-law marriages are not recognized.**
- J. **Unable to Perform the Job Functions** – Where the health care provider finds that the employee is, (1) unable to work at all, or (2) unable to perform any one of the essential functions of the employee's position. The term "essential functions" is borrowed from the American's with

Disabilities Act (ADA) to mean “the fundamental job duties of the employment position,” and does not include the marginal functions of the position.

III. SCOPE

This policy applies to all employees of the Maryland Judiciary, except judges and elected officials.

IV. POLICY STATEMENT

The FMLA permits an employee unpaid time off from work for a serious health condition of the employee or the **employee’s** parent, spouse or child. The FMLA does not authorize time off to care for any other family member.

Although the FMLA provides for a period of “unpaid” protected absence, a Judiciary employee is required to use his or her own paid leave, except for compensatory leave, concurrently with a FMLA covered absence. If an employee exhausts all paid leave while on a FMLA covered absence, then the employee will be placed in a leave-without-pay status.

FMLA is designed to help employees balance their work and family responsibilities by allowing them to take reasonable leave for certain family and medical reasons. It also seeks to accommodate the legitimate interests of employers and promote equal employment opportunity for men and women. The Judiciary strongly encourages Administrative Officials, managers, and supervisors to use this policy to assist employees in balancing work place demands with family demands.

V. REASONS FOR USING FMLA

The FMLA requires the State of Maryland to grant job protected unpaid time off from work to employees who meet the FMLA’s eligibility requirements. Eligible employees are entitled to a maximum of 12 work weeks of absence (480 hours) in a 12-month period for any of the following reasons:

- A. The birth of a child, and to care for the newborn;
- B. The placement of a child for adoption or foster care with the employee;
- C. To care for the employee’s spouse, parent, child under age 18, or an adult child who is incapable of self-care or who has a disability as defined by the ADA;

- D. The employee's own serious health condition that prevents the employee from performing his or her job functions.

VI. EMPLOYEE ELIGIBILITY

- A. To qualify under the FMLA, in addition to there being a qualifying reason:
 - 1. An employee must have worked at least a total of 12 months for the State; and
 - 2. The employee must have worked at least 1,250 hours during the preceding 12 months;
 - 3. The time of employment may be separated by a break in service as long as the amount of time worked totals at least 12 months;
 - 4. Overtime hours worked are included when calculating the 1,250-hour requirement. However, paid vacation, days on layoff, holidays, sick days, personal days, administrative absences and unpaid absences **are not** included in the total when calculating the 1,250 hours worked.
- B. The determination of whether an employee has worked the required number of hours must be calculated from the date the absence is scheduled to begin. For example, if an employee requests a FMLA absence before becoming eligible but will have worked the required number of hours by the time the absence is scheduled to begin, the employee shall be deemed to have satisfied the required number of hours. Administrative officials responding to FMLA requests must check the employee's personnel and leave records to determine whether these requirements have been met. An Administrative Official may not deny FMLA leave on these grounds unless the records clearly demonstrate that the employee has not worked a total of at least 12 months and that the employee did not work at least 1,250 hours during the preceding 12 months. The burden is on the Administrative Official. If there is no documentation to support these conclusions, the employee is entitled to a FMLA absence.
- C. The FMLA allows an employee to take up to 12-work weeks of job protected time off in a 12-month period, totaling no more than 480 hours. A "rolling" 12-month period shall be used to calculate an employee's FMLA entitlement. The determination of when additional time off may be granted shall be made by counting forward 12 months from the date on which the employee first used FMLA leave.
- D. If a husband and wife work for the State, they are limited to a combined total of 12 weeks of absence under FMLA, per rolling 12 month period, for the birth of a child or the placement of a child for adoption or foster care.

- E. FMLA absences taken for the birth of a child or the placement of a child for adoption or foster care must be taken within 12 months following the date of birth or placement of the child.

VII. INTERMITTENT AND REDUCED LEAVE SCHEDULE

- A. Employees needing intermittent FMLA leave or leave on a reduced schedule **must** attempt to schedule their leave so as not to disrupt the employer's operations. In addition, while the employee is on an intermittent or reduced leave schedule, the Administrative Official may transfer the employee to an alternative position that better accommodates the recurring leave and which has equivalent pay and benefits.
- B. FMLA time off taken to care for a qualified individual with a serious health condition or because of the employee's own serious health condition may be taken intermittently or on a reduced work schedule only when medically necessary as determined by a health care provider. Intermittent absences under the FMLA must be taken in increments of at least six minutes (.1 hour).
- C. The provisions of the FMLA permit employees to take time off intermittently or on a reduced schedule for the birth, adoption or foster care placement of a child **only if** the employee and employer agree to such an arrangement. The Judiciary agrees to approve such requests, provided, (1) the employee submits at the time of the birth, adoption or placement, a complete plan for all of the time off requested, and (2) the employee's Administrative Official approves a schedule of the requested intermittent leave.

VIII. NO LOSS OF ACCRUED BENEFITS DURING FMLA ABSENCE

- A. Employees absent on FMLA do not lose "employment benefits" accrued prior to their FMLA absence. The term "employment benefits" is broadly defined to include all retirement, health, disability, and life insurance benefits as well as sick, annual, personal, and bereavement leave benefits, regardless of whether such benefits are provided by practice or written policy of the employer. Furthermore, commendations, bonuses, and awards for perfect attendance may not be jeopardized by a FMLA absence. During an unpaid FMLA absence, the employee must continue to receive group health coverage on the same terms and conditions as an employee not on a FMLA absence. If the leave is unpaid, the employee will be billed for his or her portion of the premium. **The health care coverage may cease if the premium payment is not paid in a timely manner.**

- B. When an employee is using paid leave concurrently with a FMLA absence, the employee is entitled to the accrual of any seniority or employment benefits that the employee who remained continuously at work would have received (e.g., earning of annual and sick leave, payment of holiday when it occurs, earning of seniority credit, etc.).
- C. Once paid leave is exhausted and the employee is in unpaid status during any period of the FMLA absence, the employee is **NOT** entitled to the accrual of any seniority or leave benefits that an employee who remained continuously at work would have received.
- D. An employee on paid or unpaid leave during a FMLA absence is not entitled to any greater rights than an employee who remained continuously at work (e.g., personal leave will be lost if not used by the end of the leave year; annual leave in excess of 480 hours will be lost if not used by the end of the leave year).

IX. JOB RESTORATION UPON RETURN FROM FMLA ABSENCE

- A. An employee who is on a FMLA job protected absence and is able to return to work must be restored to the same or an equivalent job held at the time the absence began. An “equivalent” position is one with equivalent benefits, pay, and other terms and conditions of employment. An equivalent position must ordinarily be on the same shift or equivalent work schedule as the position held by the employee prior to the FMLA absence and must be located in a geographically proximate work site.
- B. The Administrative Official is obligated to place the employee in the same or equivalent position following the FMLA absence. An Administrative Official who eliminates the job of an employee who takes a FMLA absence must show that the elimination was not in retaliation for taking leave under the FMLA.
- C. When a FMLA absence of three or more days occurs due to the employee’s own serious health condition, the employee is required, prior to returning to work, to provide medical certification from a health care provider indicating that the employee is able to resume work. Employees must be notified that the Administrative Official **will** require a fitness for duty certification. The “Return to Work Medical Certification Form” **JHR013** should be given to each employee who requests FMLA for the employee’s own serious health condition. Any requirement for a fitness for work certification must be job-related, consistent with business necessity, and may be required only with regard to the particular medical condition that caused the need for the FMLA absence. An Administrative

Official is not permitted to require second or third fitness for duty certifications.

X. KEY EMPLOYEES

- A. The FMLA provides that an employer may deny restoration of employment to certain highly compensated employees if;
 - 1. Such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;
 - 2. The employer notifies the employee of the intent to deny restoration on such basis at the time the employer determines that such injury would occur; and
 - 3. In any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.
- B. Those affected by this section are salaried employees and represent the top 10 percent highest salaries of the employee population.

XI. NOTICE REQUIREMENT IF AN EMPLOYEE'S REQUEST QUALIFIES FOR FMLA

- A. When an employer gains knowledge of a qualifying condition or an employee's request for time off qualifies under the FMLA, **the Administrative Official is required** to give employees written notice detailing what employees must do and explaining any consequences for failing to comply with these requirements. The notice shall include the following:
 - 1. Time off shall be counted against the employee's annual 12 week entitlement;
 - 2. The requirements for medical certification to substantiate a serious health condition, and any consequences for failing to do so;
 - 3. The employee's requirement to use paid leave first;
 - 4. Any requirement for the employee to pay health insurance premiums and the consequences of failing to make payments;
 - 5. Any requirement that the employee present a fitness for duty certificate to be reinstated;
 - 6. The employee's right to receive the same or an equivalent job after returning from an FMLA absence; and
 - 7. The employee's potential liability to pay health insurance premiums paid by the employer during the unpaid FMLA absence, if the employee fails to return to work after the absence.

- B. The “FMLA Approval Notification” form **JHR047** contains the items of information listed above. This form should be completed by the Administrative Official upon receipt of a FMLA qualifying time off request. If no request is submitted, then the form should be completed by the Administrative Official when he or she gains knowledge of a qualifying event.
- C. The supervisor or manager is required to maintain a periodic contact log when employees are on a continuous absence. The “FMLA Periodic Reporting Schedule” form **JHR048** is to be used to record employees’ contact with management regarding their absence status and anticipated return to work date. Periodic contact should be made at least once every pay period.

XII. NOTICE REQUIREMENT IF EMPLOYEE’S REQUEST DOES NOT QUALIFY FOR FMLA

When the employer gains knowledge of an employee’s request for time off under the FMLA, and the eligibility requirements are not met, the Administrative Official is required to give employees written notice detailing the reasons.

The “FMLA Denial Notification” form **JHR049** contains the items of information necessary to inform the employee that he or she does not qualify for FMLA and the specific reason(s).

XIII. EMPLOYEE OBLIGATIONS

A. Notice Requirements

- 1. The FMLA requires that the employee provide at least 30 days notice when an absence is foreseeable. In those cases where 30 days notice is not practical, an employee is required to give notice no later than one or two working days after learning of the need for the absence.
- 2. If an employee fails to give 30 days notice when the need for an FMLA absence is foreseeable, an Administrative Official may delay designating the absence as FMLA until at least 30 days after the employee provides notice, but only if the Administrative Official has previously notified the employee of the FMLA’s requirements. If an employee is unable to give advance notice because the need was not foreseeable but gives notice after returning to work, the time off may be treated as a FMLA absence.

B. Use of Leave While on a FMLA Absence

Employees are required to use available leave during a FMLA absence. However, employees are prohibited by federal law from using compensatory leave for FMLA purposes.

C. Foster Care Requests

If an employee requests a FMLA absence to provide foster care for a child, the employee shall demonstrate that he or she is doing so under an official agreement with a government entity or pursuant to a judicial determination.

D. Medical Certification Required

1. The employee is responsible for providing the Administrative Official with medical certification of a serious health condition. An employee may provide a medical certification from any of the health care providers listed in this policy.
2. An employee requesting FMLA for the illness of a family member or the employee's own serious illness shall be provided a "Certification of Health Care Provider" form **JHR012** as soon as a request for a FMLA absence is submitted or within two business days.
3. The employee must provide the medical certification within 15 calendar days after the request unless it is not practicable. The certification shall include:
 - a. Medical facts supporting certification;
 - b. Date of commencement and duration of absence;
 - c. Additional treatments required or needed for intermittent time off; and
 - d. Ability of employee to perform essential functions of job.

E. Recertification of Medical Condition

The employee must furnish recertification for absences due to a serious health condition every 30 days unless the minimum duration of the period of incapacity specified on the most recent medical certification is more than 30 days. For example, if the most recent certification states the period of incapacity is six to eight weeks, then the employee would furnish recertification at six weeks duration. An employee may not be required to

provide recertification more than once every 30 days while on a FMLA absence, except in the following cases:

1. The employee requests an extension of leave;
2. Circumstances described by the previous certification have significantly changed (e.g. the duration of the illness, the nature of the illness, complications); or
3. The employer receives information, or there is a pattern of absences, that casts doubt upon the validity of the certification.

F. Notice of Changed Circumstances

If the employee needs to extend the FMLA absence or if the absence as originally requested is no longer necessary, an employee shall, if the changed circumstances are foreseeable, provide notice within two business days of when the employee became aware of the necessity for the change.

G. Reporting While on a FMLA Absence

If an employee takes leave because of the employee's own serious health condition or to care for a qualified individual, the employee must contact the Administrative Official at least once each pay period regarding the status of the employee's condition and intention to return to work.

H. Other Work Prohibited

An employee is prohibited from engaging in other employment during the employee's normal Judiciary work hours while on FMLA leave.

XIV. MANAGEMENT RESPONSIBILITIES

A. Responsibilities of the Administrative Official

The "Certification of Health Care Provider" form **JHR 012** should be distributed to employees who request time off either to care for a serious health condition of the employee's child, spouse, or parent, or the employee's own serious health condition. When properly completed by a health care provider, it provides the information required to determine whether the health condition satisfies the definition of a serious health condition. Failure by the employee to provide required medical certification within 15 days of the employee's request for FMLA leave may result in the denial of leave until appropriate certification is provided.

1. The Administrative Official is responsible for obtaining and evaluating information to determine whether an employee's request for time off is covered under the FMLA. With certain exceptions, the Administrative Official's determination must be rendered within two days of receiving the request. To ensure compliance, the Administrative Official must act quickly to gather required information. When an employee makes a request for time off:
 - a. Ask appropriate questions about the reasons for the employee's time off;
 - b. Recognize that the requested time off, whether paid or unpaid, may be covered by FMLA and would therefore count toward the employee's 12 week entitlement;
 - c. Inform the employee of the determination so that the time off **can be counted** as part of the employee's entitlement to 12 weeks FMLA absence;
 - d. Inform the employee of his/her rights and obligations while the employee is on a FMLA absence; and
 - e. Preserve management's right to provide only as much time off as is required by law.
2. The request for time off does not have to specifically refer to a FMLA absence.

B. Designation of a FMLA Absence

If the Administrative Official has sufficient knowledge to determine that an absence qualifies as a FMLA absence, then the Administrative Official is **required** to designate the absence as FMLA. **The employee may not bar an employer from designating any qualifying absences as FMLA leave.** The designation may be made retroactively (not to exceed to a period of 12 months) if necessary. The failure to designate an absence as FMLA can result in the leave not counting towards the employee's 12-week entitlement.

XV. USE OF SECOND AND THIRD OPINIONS OF HEALTH CARE PROVIDERS

If an Administrative Official believes that a second or third opinion is necessary, then he or she shall consult with the Judiciary Human Resources Department for further guidance.

The health care provider used to resolve differences may not be employed on a regular basis by the State. Therefore, the State Medical Director, or any entity serving in that capacity, may not provide the second or third opinions.

XVI. CONTACTING AN EMPLOYEE'S HEALTH CARE PROVIDER

The Administrative Official shall **NOT** directly contact the employee's health care provider for clarification or specifics. Only, with the employee's written permission may a health care provider acting on behalf of the Judiciary contact the health care provider of the employee or the employee's family member.

XVII. RECORDS, MAINTENANCE AND INSPECTION REQUIREMENTS

Records and documents relating to medical certifications, recertifications or medical histories of employees or employee family members maintained by the Administrative Official or the Judiciary Human Resources Department must be maintained in separate confidential files.

- A. The following records must be maintained for at least three years:
 - 1. Dates and the number of hours of FMLA time off taken by an employee (time off must be designated in the records as FMLA);
 - 2. Copies of notices and requests for time off furnished by the employee to the Administrative Official, if in writing, and copies of all notices given to employees as required under the FMLA;
 - 3. Records of any dispute between the Administrative Official and an employee regarding designation of time off as FMLA leave.
- B. The **only** persons other than the employee or the employee's designee who can obtain access to these confidential records are:
 - 1. Administrative Officials, supervisors, managers, and Human Resources officials who need to be informed of restrictions on the work or duties of an employee and necessary accommodations;
 - 2. First aid and safety personnel if an employee's physical or medical condition requires emergency treatment; and
 - 3. Government officials investigating compliance with the FMLA.

XVIII. DESIGNEES

The Administrative Official may designate any individual to act on his or her behalf in conjunction with this policy.

An employee may designate someone to act on his or her behalf in conjunction with this policy if the employee is medically incapacitated and unable to fulfill his or her reporting responsibilities under this policy. If the employee is incapacitated to the extent that he or she is incapable of making such a

designation, then the employee's spokesperson (e.g., spouse, adult family member or other responsible party) may act on his or her behalf.

XIX. INTERPRETATIVE AUTHORITY

The Judiciary Human Resources Department, in consultation with other parties as appropriate, is responsible for the interpretation of this policy.